Supreme Court, U.S.
FILED

961897 MAY 21 1997

OFFICE OF THE CLERK

NO.

In the Supreme Court of the United States

October Term, 1996

MID-SOUTH CONTROLS & SERVICES, INC.,
Petitioner,

v.

EARL J. HEBERT, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court and the Court of Appeal, Third Circuit, State of Louisiana

PETITION FOR A WRIT OF CERTIORARI

OF COUNSEL:
LEE A. ARCHER
4909 West St. Charles Ave.
Lake Charles, LA 70605
Telephone: (318) 480-1155

FRANK M. BUCK, JR.
Energy Centre, Suite 2600
1100 Poydras Street
New Orleans, LA 70163
Telephone: (504) 585-7777

TIMOTHY J. FALCON*
5044 Lapalco Blvd.
Marrero, LA 70072
Telephone: (504) 341-1234

* Counsel of Record

64 pp

QUESTIONS PRESENTED

Respondent Earl Hebert, who suffered a minor injury on a platform on the outer Continental Shelf, filed a federal LHWCA claim against his employer, petitioner Mid South. Hebert also filed a concurrent suit in state court, asserting, *inter alia*, a claim under the Louisiana Worker's Compensation Act for retaliatory discharge.

The state suit lay dormant during the resolution of the LHWCA proceedings. However, after the settlement of his LHWCA claims, Hebert again began to pursue his state court claim for retaliatory discharge under the Louisiana Act. The trial court granted Mid South's exceptions of lack of subject matter jurisdiction and *res judicata*, and dismissed the claim.

The Louisiana court of appeal, admitting that its decision was contrary to federal Fifth Circuit decisions, held that the state court had jurisdiction and that the claim was not barred by *res judicata*. Mid South applied for discretionary review to the Louisiana Supreme Court, which, in a four to three decision, declined to review the case.

The state court decision presents the following questions:

1. Does the state court decision permitting an OCS worker to pursue a Louisiana Worker's Compensation retaliatory discharge claim in state court after settling his LHWCA claims in federal court violate OCSLA, 43 U.S.C. § 1333 and LHWCA § 905(a), which provide that an OCS worker's exclusive compensation remedy is the LHWCA?

2. Is the state court decision permitting an OCS worker to pursue his Louisiana Worker's Compensation retaliatory discharge claim in state court after settling his LHWCA claims in federal court contrary to controlling federal Fifth Circuit decisions, including

LeSassier v. Chevron USA, Inc., 776 F.2d 506 (5th Cir.1985) and *Hetzel v Bethlehem Steel Corp.*, 50 F.3d 360 (5th Cir. 1995), which hold that the LHWCA provides an exclusive remedy and preempts state law retaliatory discharge claims in OCSLA cases?

3. Did the state court, which admitted that its decision was contrary to federal decisions interpreting OCSLA and the LHWCA, err in refusing to adopt the federal courts' interpretation of federal law?

4. Is the state court decision permitting an OCS worker to pursue his Louisiana Worker's Compensation retaliatory discharge claim in state court after settling his LHWCA claims in federal court contrary to congressional policy underlying the LHWCA?

5. Did the state court err in refusing to apply the federal law of *res judicata* to determine the preclusive effect of the prior federal judgment?

6. Is the state court decision permitting an OCS worker to pursue his Louisiana Worker's Compensation retaliatory discharge claim in state court after settling his LHWCA claims in federal court contrary to federal principles of *res judicata*?

RULE 14(b) STATEMENT

All parties in the lower courts are listed in the caption of this case.

RULE 29.6 STATEMENT

Petitioner's parent and subsidiary companies include:

1. Mid South Control Lines, Inc.
2. Mid South Power Systems, Inc.
3. Mid South Engine Systems, Inc.
4. Ledet and Associates, Inc.

CERTIFICATE OF INTERESTED PERSONS

The following persons and entities have an interest in this suit:

1. Mid South Controls and Services, Inc., Petitioner.

2. Earl J. Hebert, Jr., Respondent.

3. Frank M. Buck, Jr. and Robert L. Manard, of Manard & Buck, counsel for Petitioner Mid-South Controls and Services, Inc.

4. Timothy J. Falcon, counsel of record for Petitioner Mid-South Controls and Services, Inc.

5. Lee A. Archer, of counsel for Petitioner Mid-South Controls and Services, Inc.

6. L. Lane Roy, counsel for Earl J. Herbert, Respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

RULE 14(b) STATEMENT.....iii

RULE 29.6 STATEMENT.....iv

CERTIFICATE OF INTERESTED PARTIES.....v

TABLE OF CONTENTS.....vi

TABLE OF AUTHORITIES.....ix

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....7

A. THE STATE COURT'S DECISION PERMITTING AN OUTER CONTINENTAL SHELF WORKER TO PURSUE A STATE LAW WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM AFTER SETTLING HIS FEDERAL LHWCA CLAIMS IS DIRECTLY CONTRARY TO FEDERAL LAW, FIFTH CIRCUIT JURISPRUDENCE AND CONGRESSIONAL POLICY, MERITING REVIEW...8

1. The state court's decision is in direct conflict with federal law.....8

2. The state court's decision is in direct conflict with decisions of the federal Fifth Circuit Court of Appeals.....10

3. The state court's decision undermines the policy behind the LHWCA and will cause hardship to employers who provide coverage under the LHWCA 14

B. THE STATE COURT'S REFUSAL TO APPLY FEDERAL JURISPRUDENCE INTERPRETING FEDERAL STATUTES IS CONTRARY TO DECISIONS OF THE FEDERAL FIFTH CIRCUIT AND OTHER STATES, MERITING REVIEW.....15

C. THE STATE COURT'S DECISION THAT *RES JUDICATA* DOES NOT BAR RESPONDENT'S CLAIMS CONFLICTS WITH APPLICABLE FEDERAL LAW AND JURISPRUDENCE, MERITING REVIEW.....17

1. The state court's refusal to apply the federal law of *res judicata* to determine the preclusive effect of a prior federal judgment conflicts with federal law and jurisprudence.....18

2. Under the federal law of *res judicata*, respondent's state law worker's compensation claims are barred by the LHWCA settlement.....20

CONCLUSION.....25

APPENDIX

A. RULING OF THE LOUISIANA SUPREME COURT DENYING PETITIONER'S APPLICATION FOR REVIEW, DATED FEBRUARY 21, 1997.....A-1

B. OPINION OF THE LOUISIANA COURT OF APPEAL FOR THE THIRD CIRCUIT, DATED OCTOBER 9, 1996.....A-2

C. JUDGMENT OF THE FIFTEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFAYETTE, LOUISIANA, DATED DECEMBER 20, 1995.....A-13

D. RULING OF THE FIFTEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFAYETTE, LOUISIANA, DATED SEPTEMBER 2, 1993.....A-15

E. STATUTORY MATERIALS.....A-17

TABLE OF AUTHORITIES

CASES **PAGE**

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *appeal dismissed and cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).....19

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).....19

Bartholomew v. CNG Producing Co., 832 F.2d 326 (5th Cir. 1987).....8

Braxton v. U.S., 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991).....7

Columbus v. United Pacific Ins. Co., 641 F.Supp. 707 (S.D.Miss.1986) *aff'd* 833 F.2d 1007 (5th Cir.1987).....21

Commercial Box & Lumber Co. v. Uniroyal, Inc., 623 F.2d 371 (5th Cir.1980).....18

EP Operating Ltd. Partnership v. Placid Oil Co., 26 F.3d 563 (5th Cir.1994)..... 8

Gravois v. Travelers Indem. Co., 173 So.2d 550 (La.App. 1st Cir.1965), *writ denied* 175 So.2d 301, 247 La. 1016. (1965).....8

Hetzel v Bethlehem Steel Corp., 50 F.3d 360, 32 Fed. R. Serv. 3d 400 (5th Cir. 1995).....7, 12, 13, 14, 16

Jacobs v. North La. & G. R. Co., 69 F.Supp. 5 (D.C.La.1946).....24

CASES, continued... **PAGE**

Kaspar Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d 530 (5th Cir.1978).....20

Keith v. Aldridge, 900 F.2d 736, 740 (4th Cir. 1990) *cert. denied* 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990).....21

LeSassier v. Chevron USA, Inc., 776 F.2d 506 (5th Cir.1985).....7, 10, 11, 12, 13, 16, 17

Levene v. Pintail Enter., Inc., 943 F.2d 528, 531 (5th Cir.1991).....13

Lewis v. Keyes 303, Inc., 834 F.Supp. 191 (S.D.Tex.1993)..9

Maryland Cas. Co. v. Glassell-Taylor & Robinson, 68 F.Supp. 897 (D.C.La.1946).....24

Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).....14

Musial v. A & A Boats, Inc., 696 F.2d 1149 (5th Cir. 1983).....9

Parsons Steel v. First Alabama Bank, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986).....19

Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935, 950 (3d Cir. 1990).....14

Picard v. Mutual Life Ins. Co. of N. Y., 212 La. 234, 31 So.2d 783 (1946)..... 24

CASES, continued... **PAGE**

Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981).....9

Prudhomme v. Iberville Insulations, 93-778 (La.App. 3 Cir. 3/2/94), 633 So.2d 380.....24

Reeder v. Succession of Palmer, 623 So.2d 1268 (La. 1993) *cert. denied* --- U.S. ----, 114 S.Ct. 1191, 127 L.Ed.2d 541 (1994).....20

Rodrigue v. Aetna Casualty Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).....12

Shaver v. F. W. Woolworth Co., 840 F. 2d 1361 (7th Cir. 1988).....21

Smith v. Falcon Seaboard, Inc., 463 F.2d 206 (5th Cir. 1972), *cert. denied* 93 S.Ct. 688, 409 U.S. 1085, 34 L.Ed.2d 672.....9

Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980).....17

Supports to Oppose Pollution, Inc. v. Heritage Group, 760 F. Supp. 1338 (D.C. Ind. 1991).....21

Swift Chemical Co. v. Usamex Fertilizers, Inc., 490 F.Supp. 1343 (D.C.La. 1980), *affirmed* 646 F.2d 1121 (5th Cir. 1980).....20

Terrebonne Fuel & Lube, Inc. v. Placid Refining Co., 95-0654, 95-0671 (La. 1/16/96), 666 So.2d 624.....24

CASES, continued... **PAGE**

Thompson v. Teledyne Movible Offshore, Inc., 419 So.2d 822 (La.1982), *app. dismissed*, 464 U.S. 802, 104 S.Ct. 48 (1983).....5, 16, 17

STATUTES **PAGE**

United States Supreme Court Rule 13.1.....2

28 U.S.C. § 1257.....2

33 U.S.C. § 901, *et seq.*.....2, 7, 9, 12-18, 21, 23

33 U.S.C. § 905(a)..... 2, 7

33 U.S.C. § 948(a).....2, 6, 7, 11, 12, 21

43 U.S.C. § 1333..... 2, 7-12, 15-17

43 U.S.C. § 1349.....8

La. R.S. 23:1361.....2 , 7, 11

TREATISES **PAGE**

Restatement (Second) of Judgments §§ 18-20.....20

Restatement (Second) of Judgments § 26(1)(a).....21

Restatement (Second) of Judgments § 87.....19

18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Jurisdiction, § 4468 (1981)..... 19

TREATISES, continued... **PAGE**

Degnan, *Federalized Res judicata*, 85 Yale L.J. 741, 749 (1976).....19

No. _____

In the Supreme Court
of the
United States

Mid-South Controls and Services, Inc.
Petitioner,
v.
Earl J. Hebert, Jr.
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mid South Controls and Services, Inc., respectfully requests that a writ of certiorari issue to review the judgment of the Louisiana Third Circuit Court of Appeal in this case, discretionary review of which was denied by the Louisiana Supreme Court.

OPINIONS BELOW

The decision of the Louisiana Supreme Court denying review of the Court of Appeal's judgment (App. A-1) is reported at 688 So.2d 523. The Louisiana Court of Appeal's Opinion (App. A-2) is reported at 688 So.2d 1171. The Judgment (App. A-13) and Ruling (App. A-15) of the Fifteenth Judicial District Court for the Parish of Lafayette, State of Louisiana, are unreported.

JURISDICTION

The decision of the Louisiana Supreme Court denying review of the Court of Appeal's judgment was rendered on February 21, 1997. The jurisdiction of this Court is proper under 28 U.S.C. § 1257 and Rule 13.1 of the Rules of this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333.
The Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 905(a).
The Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 948(a).
The Louisiana Worker's Compensation Act, La. R.S. 23:1361.

(See Appendix E for Text)

STATEMENT OF THE CASE

In early 1992, respondent Earl J. Hebert, Jr., an employee of petitioner Mid South Controls & Services, Inc., suffered a minor injury to his back. Hebert admitted to several co-employees and principals of Mid South that he was not sure whether the injury occurred on land or offshore. However, after a discussion with a co-worker indicating that he could receive better benefits under federal law (and after refusing a light duty field job offered by Mid South and accepting employment with a competitor) Hebert filed claims against Mid South under the federal Longshore and Harbor Worker's Compensation Act (LHWCA), for recovery of federal worker's compensation benefits, in November of 1992. Therein, Hebert claimed that he injured his back while working for Mid South on a platform on the outer Continental Shelf.

Proceedings Below

On November 10, 1992, Hebert filed an LHWCA compensation claim with the U. S. Department of Labor. A timely response was filed by Mid South and its compensation carrier, followed by a form LS-207, a controversion of entitlement to benefits. After the compensation carrier filed the LS-207, Hebert filed the instant state court suit on April 14, 1993, seeking, *inter alia*, damages for Mid South's alleged retaliatory discharge or failure to rehire. On June 11, 1993, Mid South filed Exceptions of No Subject Matter Jurisdiction, Vagueness, Prematurity, Improper Venue and No Cause of Action.

The exceptions were argued before the state district court on July 26, 1993. At the hearing, the court agreed that under the applicable jurisprudence, an employee could not file a claim under the LHWCA then pursue a state-based tort action relating to retaliatory discharge. However, since the allegations were vague as to where the accident occurred, which would have triggered the exclusivity of the LHWCA, the court sustained defendant's Exception of Vagueness and continued the Exception of Lack of Subject Matter Jurisdiction until plaintiff filed an amended petition curing the vagueness. A Ruling reflecting these reasons was issued by the court on September 2, 1993. Appendix D, App. A-15.

Plaintiff filed an Amending and Supplemental Petition on September 30, 1993, alleging that his injury occurred on a fixed platform on the outer Continental Shelf. When plaintiff filed the Second Amending and Supplemental Petition, given the ruling on September 2, 1993, plaintiff was on notice that the state district court had opined that any retaliatory discharge or failure to rehire claim should be brought along with the claim he had pending with the U. S. Department of Labor, and not in state court.

The state court suit lay dormant for several years, while Hebert pursued his LHWCA claims in the federal worker's

compensation proceeding. Mid South ultimately agreed to settle Hebert's LHWCA worker's compensation claims, and the parties executed a settlement agreement and a receipt and release. On December 19, 1994, the Administrative Law Judge, the Honorable Edward Terhune Miller, entered a decision and order approving the LHWCA settlement. In that approval, the court stated as follows:

> Upon payment of the specified total amount to the Claimant Employee, and his receipt thereof, the Respondent Employer's and Respondent Carrier's liability with respect to any additional sums for the Claimant Employee's disability compensation and medical expenses and benefits under the Act shall be released and discharged. (Record, page 72, Emphasis added.)

In the Application for Approval, Hebert represented the following to the Administrative Law Judge:

> The lump sum to be received by claimant is more than adequate in that it represents significantly more money than claimant would be entitled to if the employer/carrier prevailed at trial. (Record, page 66, Emphasis added.)

On January 5, 1995, Hebert signed a release, which stated in pertinent part as follows:

> The affiant acknowledges receipt on January 5, 1995 of $75,000.00 of settlement funds and $900.00 in expense reimbursement in final and complete settlement of all claims against Mid South Controls & Services and its workmen's compensation insurer Commercial Union Insurance Company, arising out

> of the accident of March 27, 1992. (Emphasis added.)

Surprisingly, after he received the substantial settlement, Hebert pressed Mid South for responsive pleadings in the state court action. On August 9, 1995, Mid South filed exceptions of Lack of Subject Matter Jurisdiction and *Res judicata* seeking dismissal of Hebert's worker's compensation retaliatory discharge claims, based on the prior LHWCA settlement.

At the hearing on the exceptions on December 4, 1995, the state district court agreed that any employment discrimination claims, including the claim of discriminatory discharge, should be brought before the U. S. Department of Labor. The court also agreed that the plaintiff, by settling all claims under the LHWCA after the court had put him on notice in September of 1993 that he could not proceed in state court with his federal worker's compensation claim for retaliatory discharge, had settled all employment discrimination claims, which would be barred in the instant suit by the doctrine of *res judicata*. Alternatively, the court agreed that such a claim, if not barred by *res judicata*, would lie exclusively under the LHWCA and therefore the state courts lacked subject matter jurisdiction. The state district court accordingly dismissed the plaintiff's employment-related claim for discriminatory or retaliatory discharge. Appendix C, App. A-13.

The state court of appeal reversed the district court's judgment on both of these issues. Relying upon the Louisiana Supreme Court's decision in *Thompson v. Teledyne Movible Offshore, Inc.*, 419 So.2d 822 (La.1982), *appeal dismissed*, 464 U.S. 802, 104 S.Ct. 48 (1983), a decision that is factually inapposite and not controlling, the court of appeal decided that the state court had subject matter jurisdiction over plaintiff's wrongful discharge claim. Appendix B, App. A-2.

In so doing, the court refused to apply federal jurisprudence mandating that in cases arising out of injuries on the outer Continental Shelf, and thus subject to the Outer Continental Shelf Lands Act, the federal courts have exclusive jurisdiction over wrongful discharge claims, which must be brought in federal court under the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 948(a). The court stated:

> We recognize that the federal court decisions are in complete conflict with the decision of the Louisiana Supreme Court. In determining the appropriate result in this case, we feel compelled to follow the guidance of the highest court of this state. Therefore, we conclude that the state district court does have subject matter jurisdiction of a claim for discrimination associated with retaliatory discharge or failure to rehire, and we reverse the trial court on that issue.

Opinion at page 7, Appendix B, App. A-8.

Regarding the Exception of *Res Judicata*, the court of appeal found that the plaintiff's claim for wrongful discharge under state law differed in that under state law, the plaintiff's recovery could include attorney's fees and court costs. Further, without citation to any authority, the court found that because the state suit was still "pending" at the time the LHWCA suit was settled, the suit was not barred by *res judicata*. Opinion at 8, Appendix B, App. A-10. Particularly considering that Hebert was on notice that the district court considered his wrongful discharge claim to be a federal LHWCA worker's compensation matter, and that Hebert thereafter settled and released Mid South from any and all worker's compensation claims, the state court's decision that *res judicata* does not apply violates settled federal law.

Mid South filed an Application for a Writ seeking review of the court of appeal's decision with the Louisiana Supreme Court. In a four to three decision, the Louisiana

Supreme Court declined to review the case. Appendix A, App. A-1.

REASONS FOR GRANTING THE WRIT

The decision of the Louisiana state court permitting an outer Continental Shelf worker who has recovered from his employer under the Longshore and Harbor Worker's Compensation Act to maintain a state law compensation action for retaliatory discharge is directly contrary to federal law, including the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333; the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), federal Fifth Circuit jurisprudence directly on point, including *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir.1985) and *Hetzel v Bethlehem Steel Corp.*, 50 F.3d 360, 1996 A.M.C. 1211, 32 Fed.R.Serv.3d 400 (5th Cir. 1995), and congressional policy underlying the LHWCA.

Moreover, the decision of the Louisiana state court refusing to hold that the ALJ approved settlement of the LHWCA claims barred additional worker's compensation claims under the doctrine of *res judicata* is directly contrary to the federal law of *res judicata*, which must be applied in a case where the effect of a prior federal judgment is at issue.

As this Court noted in *Braxton v. U.S.*, 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991), a principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the circuit courts of appeals and state courts concerning the meaning of provisions of federal law. This case demonstrates that the state courts in Louisiana and the federal Fifth Circuit are in direct conflict over the exclusivity provisions and the preemptive effect of the LHWCA in outer Continental Shelf cases, to the grave detriment of all Louisiana employers who provide benefits to their employees under the LHWCA.

For these reasons, and other reasons that this Honorable Court may ascertain, petitioners respectfully urge

this Court to issue a writ, review and ultimately reverse the judgment of the state court in this case.

A. THE STATE COURT'S DECISION PERMITTING AN OCS WORKER TO PURSUE A STATE LAW WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM AFTER SETTLING HIS FEDERAL LHWCA CLAIMS IS DIRECTLY CONTRARY TO FEDERAL LAW, FIFTH CIRCUIT JURISPRUDENCE AND CONGRESSIONAL POLICY, MERITING REVIEW.

1. The state court's decision is in direct conflict with federal law.

Under the Outer Continental Shelf Lands Act (OCSLA), federal courts have original jurisdiction over cases and controversies arising out of, or in connection with any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals. 43 U.S.C.A. § 1349; 43 U.S.C.A. § 1333 (a).

OCSLA was intended to vest all civil and political jurisdiction in matters involving offshore drilling activities on the outer Continental Shelf in exclusive federal court jurisdiction. *EP Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563 (5th Cir.1994); *Gravois v. Travelers Indem. Co.*, 173 So.2d 550 (La.App. 1st Cir.1965), *writ denied* 175 So.2d 301, 247 La. 1016. (1965). OCSLA thus applies to all claims arising out of accidents on offshore production platforms. *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir. 1987).

Under OCSLA, the federal district courts are required to apply the law of the adjacent state as surrogate federal law to the extent that it is not inconsistent with federal laws and regulations. 43 U.S.C.A. § 1333(a)(1). This surrogate federal

law is still considered federal law, and is to be administered and enforced by the federal, not state, courts. As the Fifth Circuit in *EP, supra*, noted: "After establishing that the law applicable to the subsoil and seabed of the OCS and to structures erected thereon is federal law, § 1333(a)(2)(A) then provides that all such applicable laws shall be administered and enforced by the appropriate officers and Courts of the United States." *Id.*

OCSLA specifically provides that the Longshore and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C.A. § 901, *et seq.*, applies to workers on the outer continental shelf pursuant to 43 U.S.C.A. § 1333(b). The foregoing section automatically extends the coverage of the Longshore and Harbor Workers' Compensation Act, sections 901-950 of Title 33, to provide compensation for injuries to employees that occur on the outer continental shelf. *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981).

Although the results may differ in twilight zone cases and cases where the injured worker is a seaman, in pure OCSLA cases, such as the instant case, the Longshore and Harbor Workers' Compensation Act provides the exclusive remedy for an injured platform worker. *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir. 1983); *Smith v. Falcon Seaboard, Inc.*, 463 F.2d 206 (5th Cir. 1972), *cert. denied* 93 S.Ct. 688, 409 U.S. 1085, 34 L.Ed.2d 672 (OCSLA restricts the recovery available to workers assigned to platforms to that afforded by LHWCA, though making no such restrictions on recovery available to workers assigned to vessels); *Lewis v. Keyes 303, Inc.*, 834 F.Supp. 191 (S.D.Tex.1993) (because employee who was working aboard jack-up drilling rig on the outer Continental Shelf was not a seaman, his personal injury claims were governed by the Longshore and Harbor Workers' Compensation Act).

The Longshore and Harbor Worker's Compensation Act provides a specific and exclusive remedy for employees who have been wrongfully discharged or otherwise

discriminated against for bringing LHWCA compensation proceedings, in 33 U.S.C.A. § 948(a). The Louisiana Worker's Compensation laws also contain an anti discrimination provision, in La. R.S. 23:1361. However, because the LHWCA contains an express provision regarding discrimination, the Louisiana Worker's Compensation Act provision is preempted, and the employee's exclusive remedy is under the LHWCA. See, *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir.1985), in which the Fifth Circuit held that a platform worker who had filed a claim for benefits under the Longshore and Harbor Workers' Act was required to bring his retaliatory discharge action under the Longshore and Harbor Workers' Act as adopted by the Outer Continental Shelf Lands Act, rather than invoking the Louisiana retaliatory discharge remedy.

Under the foregoing authorities, the state court of appeal's decision reversing the district court's dismissal of plaintiff's state law discriminatory discharge claim was directly contrary to federal law, meriting review.

2. The state court's decision is in direct conflict with decisions of the federal Fifth Circuit Court of Appeals.

Numerous federal Fifth Circuit decisions clarify that a worker who is injured on a platform on the outer Continental Shelf cannot maintain an action for retaliatory discharge under state worker's compensation laws. In this case, pursuant to OCSLA, Hebert had to proceed under the LHWCA to claim worker's compensation benefits, and he in fact recovered benefits under the LHWCA in a settlement that was approved by the Administrative Law Judge. Pursuant to the peremptive provisions in OCSLA, Hebert's exclusive remedy for retaliatory discharge or discrimination for filing his LHWCA claim was under the LHWCA. The federal courts and officers

have sole jurisdiction over LHWCA claims, and the state courts simply cannot entertain such claims.[1]

LeSassier v. Chevron USA, Inc., 776 F.2d 506 (5th Cir.1985) is directly on point. After LeSassier was injured on a fixed platform located off the Louisiana coast, he filed a claim for benefits under the LHWCA. LeSassier also filed a diversity suit in federal court for retaliatory discharge under Louisiana law, La. R.S. 23:1361 subsection B (which prohibits discharge because of an employee's assertion of claims under Louisiana law, other states' laws, or laws of the United States).

Chevron moved for summary judgment, which the federal district court granted. The district court noted that the platform on which LeSassier was injured was located on the outer Continental Shelf, as defined in the Outer Continental Shelf Lands Act, 43 U.S.C. S 1331(a). It reasoned that because the OCSLA specifically adopts the LHWCA, 43 U.S.C. S 1333(b), which itself contains a retaliatory discharge provision, 33 U.S.C. S 948a, LeSassier could not rely on state law. Instead, he was required to use the administrative remedy for retaliatory discharge provided by § 948a.

The court acknowledged that OCSLA does adopt adjacent state law, but only to the extent that it is "applicable and not inconsistent with [OCSLA] or with other Federal laws." 43 U.S.C. §1333(a)(2)(A). The court held that as to a retaliatory discharge claim there was neither a gap in the OCSLA/LHWCA statutory scheme nor a jurisdictional dilemma as required by those "twilight zone" cases recognizing the need for concurrent jurisdiction necessary for

---

[1] Exclusive original jurisdiction of compensation claims under the LHWCA is vested in the United States Employees' Compensation Commission, which administers the Act through a Deputy Commissioner of the Bureau of Employees' Compensation, U.S. Department of Labor.

the protection of workers who might otherwise assert their rights under the wrong act.

LeSassier appealed, urging several errors of law. He claimed, first, that OCSLA did not apply, because the retaliatory discharge did not occur on the platform. The Fifth Circuit gave short shrift to that argument, noting that "it would defy reason" to suggest that by enacting the LHWCA's retaliatory discharge provision, Congress contemplated that covered retaliatory discharges had to occur on an OCS platform.

LeSassier next urged that that the district court erred in concluding that the exclusivity provisions of the OCSLA/LHWCA scheme apply to a retaliatory discharge claim because such a claim does not involve "disability or death of an employee resulting from any injury occurring ... on the outer Continental Shelf...." 43 U.S.C. S 1333(b). However, LeSassier unduly limited OCSLA's scope, for the cited provision covers all claims "arising out of" injuries on the outer Continental Shelf.

LeSassier also urged that OCSLA §1333(a)(2)(A) permits the invocation of "adjacent state law," which would include Louisiana's retaliatory discharge statute. However, the court noted that the state laws must be applicable and not inconsistent with federal law, and that it had consistently held that the term "'applicable' must be read in terms of necessity--necessity to fill a significant void or gap." *LeSassier, supra,* at 560, *citing Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). The court concluded that such a gap simply does not exist where Congress provided a specific statutory provision, 33 U.S.C. S 948a, to address retaliatory discharges.

More recently, the Fifth Circuit decided *Hetzel v Bethlehem Steel Corp.*, 50 F.3d 360, 1996 A.M.C. 1211, 32 Fed.R.Serv.3d 400 (5th Cir. 1995). Therein, an OCS worker who had filed for benefits under the LHWCA brought a separate diversity claim against his employer under the Texas

Deceptive Trade Practices Act. In reviewing the district court's dismissal on summary judgment, the Fifth Circuit assumed, for the sake of argument only, that the case was a "twilight zone" case. Even so, the court concluded that the suit was preempted, because the LHWCA provided the worker's sole remedy:

> As set forth above, federal preemption can occur where a state statute either directly conflicts with federal law or frustrates the purpose behind the federal law. We find that both conditions occur here. First, § 905(a) provides in part, "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee." Where liability arises as a result of the employment relationship, Congress explicitly intended for the LHWCA to be the exclusive remedy. See also *Levene v. Pintail Enter., Inc.*, 943 F.2d 528, 531 (5th Cir.1991) ("The LHWCA absolutely bars suit for all other acts taken in the capacity as the employer of the injured worker.")

Bethlehem Steel, supra, at 365 (Footnote omitted).

Furthermore, the court noted that in "twilight zone" cases, where the worker has an election of remedies, even assuming the concurrent jurisdiction of the state courts, once the worker elects to recover under the LHWCA, he is bound by the provisions of the Act. Even if Texas did allow a DTPA remedy under its own worker's compensation laws, it could not supplant the immunity provision of the LHWCA. The court concluded that "Because application of the DTPA, in this context, is clearly contrary to the provisions of the LHWCA and conflicts with the purpose of the Act, Hetzel's claim against his employer is preempted." *Id., citing LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir.1985).

3. The state court's decision undermines the policy behind the LHWCA and will cause hardship to employers who provide coverage under the LHWCA

The Fifth Circuit in *Hetzel v Bethlehem Steel Corp., supra,* noted that the LHWCA was designed to strike a balance between the concerns of workers and the concerns of their employers, and this result was in accord with congressional policy:

> Worker's compensation laws, like the LHWCA, typically replace a negligence action with an administrative system as the method for determining an employee's right to, and amount of, compensation for injuries sustained on the job.... In enacting the LHWCA, Congress intended that it be the sole and exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award. *Brown v. Forest Oil Corp.*, 29 F.3d 966, 971 (5th Cir.1994)... Congressional policy would be frustrated if an injured worker were allowed to collect benefits under the Act, and then sue his employer under a state statutory tort theory. Not only does the function of the LHWCA depend on the exclusiveness of the remedy, but the language of the Act plainly mandates such a result. Preemption of the state act is required to avoid frustration of the policies and purpose behind the LHWCA.

Bethlehem Steel, supra, at 366-7 (emphasis added). *Accord, Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983) (LHWCA was designed to strike a balance between employers and employees); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 950 (3d Cir. 1990).

In the instant case, it is clearly against sound congressional policy to permit Hebert, an OCS worker, to recover substantial benefits under the LHWCA then pursue a

state law worker's compensation claim, or any other employment related claim, against his employer.

In sum, under OCSLA and the LHWCA, Fifth Circuit precedent, and sound congressional policy, Hebert's state law discriminatory discharge claim is preempted by the LHWCA, which provides his sole remedy against his employer. Hebert filed a claim under the LHWCA, and received a substantial ALJ approved settlement of his claims from his employer. He simply cannot bring an action under the Louisiana Worker's Compensation laws for retaliatory discharge: his remedy is limited to the LHWCA. Finally, the state court in this case has no jurisdiction to entertain a federal LHWCA retaliatory discharge claim, such a claim must be resolved by the federal courts and officers of the United States.

As such, the state court of appeal erred as a matter of law in reversing the district court's dismissal of Hebert's discriminatory discharge claim, meriting review.

B. THE STATE COURT'S REFUSAL TO APPLY FEDERAL JURISPRUDENCE INTERPRETING FEDERAL LAW IS CONTRARY TO DECISIONS OF THE FEDERAL FIFTH CIRCUIT AND OTHER STATES, MERITING REVIEW.

The state court of appeal expressly recognized that its decision was contrary to federal court decisions interpreting OCSLA and the LHWCA:

> We recognize that the federal court decisions are in complete conflict with the decision of the Louisiana Supreme Court. In determining the appropriate result in this case, we feel compelled to follow the guidance of the highest court of this state.

Opinion at 7, App. A-8.

The state court erred in relying on a Louisiana state court case, *Thompson v Teledyne Movible Offshore, Inc.*, 419 So.2d 822 (La. 1982), *app. dismissed*, 464 U.S. 802, 104

S.Ct. 48 (1983), in rendering its decision, for several reasons. First of all, the determination whether the LHWCA applies is a question of federal, and not state law. See, e.g., *Hetzel v Bethlehem Steel, supra; Davidson v. Enstar Corp.*, 848 F.2d 574, *on rehearing* 860 F.2d 167, *rehearing denied* 864 F.2d 791 (5th Cir. 1988) (determination of whether employees' claims against parties to joint operation agreement, which controlled operations of outer continental shelf oil platform, for injuries suffered when platform collapsed during hurricane, were covered by Longshore and Harbor Workers' Compensation Act, was controlled by federal not state law.) State courts are bound by federal decisions on the subject. *Id.*, See also, *Byrd v. New York Central System*, 70 A.2d 97, 6 N.J.Super. 568 (N.J.Co.1949) (New Jersey courts in dealing with application of the LHWCA and the Federal Employers' Liability Act are bound by federal courts' construction thereof); *Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp.*, 65 A.2d 304, 193 Md. 20 (Md.1949) (state court of appeals was bound by construction placed upon this chapter by federal courts.) Accordingly, the state court of appeal in this case erred in refusing to follow the Fifth Circuit's decisions in *LeSassier* and *Bethlehem Steel, supra*.

Second, the court of appeal failed to recognize that the decision in *Thompson, supra*, is factually distinguishable from the instant case. This case involves a worker on an offshore platform who, through OCSLA, is subject to the specific provisions in the LHWCA regarding claims for retaliatory discharge and exclusivity. Unlike the worker in *Thompson*, here the worker in fact filed for benefits under the LHWCA. There is no "twilight zone" or confusing concurrent jurisdictional realm within which the compensation claims were misdirected. In *Bethlehem Steel, supra*, the court noted that for a worker whose case is not in the "twilight zone," the LHWCA, rather then state compensation law, provides his

exclusive remedy. There is no room for doubt here. Hebert's sole remedy is through the LHWCA.

Third, as the Fifth Circuit discussed in detail in *LeSassier, supra, Thompson* was wrongly decided. The court in *Thompson* relied upon *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 724, 100 S.Ct. 2432, 2438, 65 L.Ed.2d 458 (1980). *Sun Ship*, however, did not involve an OCSLA-based compensation claim. *LeSassier, supra*, at 509. This Court in *Sun Ship* specifically focused on workers who, because there were "three jurisdictional spheres" into which non-OCSLA marine-related injuries fell, were confronted by a "jurisdictional dilemma" due to the "twilight zone" in which state remedies abut or overlap federal remedies. 447 U.S. at 719, 100 S.Ct. at 2435.

In sum, federal decisions interpreting federal law govern here, and the court of appeal's reliance on the state court *Thompson* case was misplaced. An OCS worker is governed by the Outer Continental Shelf Lands Act, 43 U.S.C. 1333, and is thus limited to the provisions of the federal worker's compensation laws included by reference therein. Federal law preempts the state law retaliatory discharge claim. The federal claims must be brought before the U.S. Department of Labor.

Accordingly, the district court was correct in determining that any employment discrimination related claim by plaintiff against Mid South was not properly before the state court, and the court of appeal's reversal of that decision merits review.

C. THE STATE COURT'S DECISION THAT *RES JUDICATA* DOES NOT BAR RESPONDENT'S CLAIMS CONFLICTS WITH APPLICABLE FEDERAL LAW AND JURISPRUDENCE, MERITING REVIEW.

Mid South's Exception of *Res judicata* in this matter was based upon plaintiff's transaction and compromise of any and all claims against Mid South under the LHWCA, which

claims were settled and approved by the Administrative Law Judge in December, 1994. Decision and Order, Record at 70-73. The state district court correctly held that Hebert's claim against Mid South for retaliatory discharge was barred by *res judicata*. The state court of appeal reversed.

As its reason for reversal, the court of appeal found that the plaintiff's claim for wrongful discharge under state law differed slightly in that under state law, the plaintiff's recovery could include attorney's fees and court costs. Further, without citation to any authority, the court found that because the state suit was still "pending" at the time the LHWCA suit was settled, and Mid South allegedly did nothing to consolidate the two suits, the suit was not barred by *res judicata*.

As discussed *infra*, under the applicable law, the settlement, which was approved by the ALJ, bars any further worker's compensation claims against Mid South. In addition, the state court's unsupported conclusion that *res judicata* does not apply to pending litigation was an egregious error of law. As such, even assuming that the state court retained jurisdiction, the state court of appeal clearly erred in reversing the district court's decision that *res judicata* barred the retaliatory discharge claim against Mid South.

1. The state court's refusal to apply the federal law of *res judicata* to determine the preclusive effect of a federal judgment conflicts with federal law and jurisprudence.

In this case, the courts were asked to determine the preclusive effect of a judicially approved settlement rendered by a federal tribunal exercising federal question jurisdiction. When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, the federal law of *res judicata* must be applied. *Commercial Box & Lumber Co. v. Uniroyal, Inc.*, 623 F.2d 371, 373 (5th Cir.1980); *Aerojet-General*

Corp. v. Askew, 511 F.2d 710 (5th Cir.), *app. dismissed and cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); Restatement (Second) of Judgments § 87 (1982); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Jurisdiction § 4468 (1981). See also *Tye v. Co-Mar Offshore Operators, Inc.*, 95 0094 (La.App. 1 Cir. 10/6/95) 1995 WL 588277 (when a state court considers the preclusive effect of a federal court judgment based on federal question jurisdiction, the court must apply the federal law of *res judicata*).

The courts of Louisiana should afford full faith and credit to the judgments of a federal court. 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4468 (1981); Degnan, *Federalized Res judicata*, 85 Yale L.J. 741, 749 (1976). A Constitution that requires state courts to give full faith and credit to the judgments of other state courts could not contemplate that state courts should be free to disregard the judgments of federal courts. 18 Wright, Miller & Cooper, *supra*, § 4468. A party faced with re-litigation of a federal judgment in state court may either plead the federal judgment as *res judicata*, or before final judgment in the state court, seek a federal court injunction against the state proceedings. *Parsons Steel v. First Alabama Bank*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

As discussed *infra*, under the applicable federal law, Hebert's claims were clearly barred under the doctrine of *res judicata*, and the state court of appeal erred in failing to so hold.

2. Under the federal law of *res judicata*, Hebert's state law worker's compensation claims are barred by the LHWCA settlement.

Under federal law, there are two broad classifications of *res judicata*. The first is true *res judicata*, also known as "claim preclusion," and the second is collateral estoppel, also

known as "issue preclusion." Basically, under the first doctrine, "claim preclusion," a judgment, once rendered, is treated as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action," while under the second doctrine, "issue preclusion," the relitigation of issues that were actually adjudicated and essential to the judgment in the prior litigation between the same parties is barred. *Swift Chemical Co. v. Usamex Fertilizers, Inc.*, 490 F.Supp. 1343 (D.C.La. 1980), *affirmed* 646 F.2d 1121 (5th Cir. 1980.)

The court in *Reeder v. Succession of Palmer*, 623 So.2d 1268 (La. 1993) *cert. denied* --- U.S. ----, 114 S.Ct. 1191, 127 L.Ed.2d 541 (1994), explained the federal law of *res judicata* or "claim preclusion," as follows:

> Under federal precepts, "claim preclusion" or "true *res judicata*" treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.

Reeder, supra, at 1272 (emphasis added), citing *Kaspar Wire Works, Inc. v. Leco Engineering & Mach.*, 575 F.2d 530 (5th Cir.1978); Restatement (Second) of Judgments § 18-20 (1982.)

Under federal jurisprudence, in accord with the Restatement, Second of Judgments, the view is that a major function of claim preclusion is to force a plaintiff to explore all of the facts, develop all theories and demand all the

remedies available to him in the first suit. *Shaver v. F. W. Woolworth Co.*, 840 F. 2d 1361 (7th Cir. 1988); *Supports to Oppose Pollution, Inc. v. Heritage Group*, 760 F. Supp. 1338 (D.C. Ind. 1991).

Federal courts, in accord with the Restatement, hold that settlements and releases will bar all future claims against a settling defendant based upon the facts underlying the settlement, unless there is an express agreement to permit "claim splitting" or a reservation of rights by the plaintiff. See, e.g., *Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir. 1990) *cert. denied* 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990) (settlement and release without express reservation of rights barred employee's second suit against employer); *Columbus v. United Pacific Ins. Co.*, 641 F.Supp. 707, 710, 711, (S.D.Miss.1986) *affirmed* 833 F.2d 1007 (5th Cir.1987) (settlement barred a second action against the defendants because the actions involved related to a single transaction, therefore, all claims that were or could have been advanced were barred by *res judicata*.) *Accord*, Restatement (Second) of Judgments § 26(1)(a) (Since a principal purpose of the general rule of *res judicata* is to protect the defendant from the burden of relitigating the same claim in different suits, the defendant must consent to the splitting of the claim.)

Application of the law to the facts in this case demonstrates that the settlement and release by Hebert of his LHWCA worker's compensation claims against defendant bar his state law worker's compensation claim for retaliatory discharge. On December 5, 1994, Hebert and Mid South filed an Application for Approval of a Settlement Agreement under Section 8(i) of the LHWCA with the administrative law judge. In neither the Application for Approval of Settlement nor the Decision and Order approving the settlement was there any reservation to plaintiff or requested by plaintiff to keep alive any claims that he had against Mid South for retaliatory discharge as set forth in Section 948(a) of the LHWCA. At the time he submitted the application and the

court's order, Hebert was well aware that there was an additional claim arising out of the transaction and occurrence made the subject of the LHWCA claim, because Mid South had already allegedly refused to re-hire him. That alleged cause of action had been filed in April, 1993, and had been addressed by the state district court in September, 1993.[2]

Therefore, in the absence of a reservation, the following language from the administrative law judge merged any retaliatory discharge claim and now bars it:

> Upon payment of the specified total amount to the Claimant Employee, and his receipt thereof, the Respondent Employer's and Respondent Carrier's liability with respect to any additional sums for the Claimant Employee's disability compensation and medical expenses and benefits under the Act shall be released and discharged. (R., page 72. Emphasis added).

---

2 In response to plaintiff's original claim in his original Petition filed in April, 1993, defendant filed an Exception of Subject Matter Jurisdiction regarding his employment discrimination claim. The trial court agreed that if the accident of which he complained occurred on a platform on the outer Continental Shelf, it had to be brought with his LHWCA claim because the exclusivity provisions of the LHWCA barred any state-based claim, citing *LeSassier v. Chevron USA, Inc.*, 776 F. 2d 506 (5th Cir. 1985). Thus, in the September 2, 1993 ruling by the District Court, the plaintiff was put on notice that if his accident occurred on a fixed platform, it would be dismissed for lack of subject matter jurisdiction and plaintiff would be required to litigate any employment discrimination claim with the U. S. Department of Labor with his pending LHWCA claim. (Record, pages 40-41)

Thereafter, plaintiff filed a Second Amending and Supplemental Petition on September 30, 1993. Knowing that the amending petition would oust his employment discrimination claim from district court and require him to litigate it along with his LHWCA claims, plaintiff did not press for any responsive pleadings in state court. Instead, he chose to forge ahead with the LHWCA case.

Finally, Hebert signed a release on January 5, 1995, which stated in pertinent part as follows:

> The affiant acknowledges receipt on January 5, 1995 of $75,000.00 of settlement funds and $900.00 in expense reimbursement in final and complete settlement of all claims against Mid South Controls & Services and its workmen's compensation insurer Commercial Union Insurance Company, arising out of the accident of March 27, 1992. (Emphasis added.)

The phrase "final and complete settlement of all claims" means just what it says. This is not a situation where plaintiff settled his LHWCA claims and is now bringing for the first time a retaliatory discharge claim. Indeed, plaintiff brought the retaliatory discharge claim almost contemporaneously with the filing of his LHWCA claim. He filed his retaliatory discharge claim as a result of his employer truthfully reporting to the compensation insurer that plaintiff made statements that his accident or injuries may have occurred on a land-based job covered solely by state compensation. He brought forth both claims around the same time against the same defendant and settled all claims with the defendant arising out of that incident. It is difficult to imagine a better set of facts and circumstances to support a plea of *res judicata*.

Under the applicable federal rules on *res judicata*, the settlement bars the additional claim for retaliatory discharge. When plaintiff compromised his worker's compensation claims with Mid South, both the same parties to the instant suit, he had been directed by the district court that the U. S. Department of Labor had exclusive jurisdiction over any employment discrimination claim arising out of his benefits for LHWCA. Yet plaintiff compromised his claim for all benefits and all sums due under the Act without any reservation for any employment discrimination claim; there was a binding

transaction and compromise of such a claim, and it is now barred by *res judicata*.

The unsupported statement of the state court that the concept of *res judicata* was not intended to apply to "pending litigation" (Opinion at p. 8) simply does not make sense. If such were the case, then a party could file multiple suits at the same time and litigate the same issues *ad infinitum*. It is this exact scenario that the rules of *res judicata* were designed to prevent. See, e.g. *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 95-0654, 95-0671 (La. 1/16/96), 666 So.2d 624 (purpose of both federal and Louisiana law on *res judicata* is essentially same: to promote judicial efficiency and final resolution of disputes by preventing needless relitigation); *Prudhomme v. Iberville Insulations*, 93-778 (La.App. 3 Cir. 3/2/94), 633 So.2d 380 (purpose of *res judicata* is to foster judicial efficiency and to protect defendant from multiple lawsuits.)

Moreover, the jurisprudence is quite clear that, in instances of simultaneous litigation in state and federal court, the first judgment rendered will have the effect of *res judicata* on the other suits. See, e.g., *Picard v. Mutual Life Ins. Co. of N. Y.*, 212 La. 234, 31 So.2d 783 (1946) (state court was not deprived of its jurisdiction of suit by pendency of appeal of federal court action, but federal court judgment, on becoming final, had effect of precluding state courts from adjudging anything contrary to federal court's judgment); *Jacobs v. North La. & G. R. Co.*, 69 F.Supp. 5 (D.C.La.1946) (a plaintiff may prosecute the same cause of action in both courts at the same time subject only to the right of the parties to plead the judgment rendered first in the one as *res judicata* in the other court); *Maryland Cas. Co. v. Glassell-Taylor & Robinson*, 68 F.Supp. 897 (D.C.La.1946) (where suits are brought upon same claim in both state and federal courts, the judgment of the court first deciding the matter may be pleaded as *res judicata* in the other suit which remains undetermined).

In sum, the state court of appeal erred in refusing to apply federal law to determine the *res judicata* effect of a prior federal judgment. And, under applicable federal law, the state court erred in reversing the district court's grant of Mid South's exception of *res judicata*. The settlement and release were intended to compromise all of Hebert's worker's compensation claims, including worker's compensation claims for retaliatory discharge. Plaintiff did not reserve his rights, nor did Mid South agree that plaintiff could split his claims. The court of appeal's reason for its decision, that "we do not find that the concept of *res judicata* was intended to apply to pending litigation," is unsupported by any authority and is legally invalid.

Clearly, the state district court properly dismissed the employment related discrimination claim with prejudice and at plaintiff's cost, and the court of appeal's decision reversing that judgment was erroneous under applicable federal law, meriting review.

CONCLUSION

As a result of the state court's decision in this case, Louisiana state and federal courts now espouse diametrically opposed interpretations of federal law. Under federal law and federal Fifth Circuit decisions, the Longshore and Harbor Worker's Compensation Act provides the exclusive compensation remedy for an injured outer Continental Shelf worker, who must bring the proceedings before a federal tribunal. Under the instant Louisiana state court decision, a worker may bring both an LHWCA proceeding and a state court compensation proceeding, in either state or federal court. Moreover, under the instant decision, the prior resolution of the LHWCA claim by the federal tribunal will not be binding on the worker in state court.

The result, which is contrary to federal law, federal jurisprudence, and congressional policy underlying the

LHWCA, will work a grave hardship on Louisiana employers who provide coverage to their employees under the LHWCA.

Accordingly, petitioner Mid South Controls and Services, Inc., respectfully submits that a writ should issue to review the decision of the Louisiana Third Circuit Court of Appeal, and that, after due proceedings had, the decision should be reversed.

Respectfully submitted,

OF COUNSEL:
LEE A. ARCHER
4909 West St. Charles Ave.
Lake Charles, LA 70605
Telephone: (318) 480-1155

FRANK M. BUCK, JR.
Energy Centre, Suite 2600
1100 Poydras Street
New Orleans, LA 70163
Telephone: (504) 585-7777

TIMOTHY J. FALCON*
5044 LaPalco Blvd.
Marrerro, LA 70072
Telephone: (504) 341-1234

* Counsel of Record

May 21, 1997

APPENDIX A

Earl J. HEBERT, Jr.
v.
MID SOUTH CONTROLS AND SERVICES, INC.
No. 96-C-2708.
Supreme Court of Louisiana.
Feb. 21, 1997.

In re Mid South Controls & Serv., Inc.;--Defendant(s); applying for writ of certiorari and/or review, supervisory and/or remedial writ; Parish of Lafayette, 15th Judicial District Court, Div. "F", No. 93-1649-2B; to the Court of Appeal, Third Circuit, No. CA96-0378.
Denied.

MARCUS, TRAYLOR and KNOLL, JJ., would grant the writ.

VICTORY, J., not on panel.

APPENDIX B

Earl J. HEBERT, Jr., Plaintiff-Appellant,
v.
MID SOUTH CONTROLS AND SERVICES, INC.,
Defendant-Appellee.
No. 96-378.
Court of Appeal of Louisiana,
Third Circuit.
Oct. 9, 1996.

Before DOUCET, C.J., and YELVERTON and PETERS, JJ.

PETERS, Judge.

The plaintiff, Earl J. Hebert, Jr., brought this suit against his former employer, Mid South Controls and Services, Inc. (Mid South), to recover damages for various alleged actions by Mid South. The complained of actions arose in the context of Hebert's employment with Mid South and his alleged ownership of corporate stock. The trial court granted a declinatory exception of lack of subject matter jurisdiction and a peremptory exception of res judicata filed by Mid South as to some of Hebert's claims and granted Mid South's declinatory exception of venue as to his remaining claims. Hebert has appealed.

DISCUSSION OF THE RECORD

To date in this litigation, little evidence has been presented to the trial court on the various issues, and the record consists primarily of allegations and pleadings. Thus, the procedural history of this suit is significant in resolving the pending issues.

This state court action was instituted in Lafayette Parish in the Fifteenth Judicial District on April 4, 1993, by Earl J. Hebert, Jr. against his former employer, Mid South Controls and Services, Inc., a Louisiana corporation domiciled in

Jefferson Parish. In *2 the initial petition, Hebert alleges that both an employer-employee relationship and a corporation-shareholder relationship existed between Mid-South and himself and that the deterioration of these relationships gave rise to his claim for damages.

In his original petition, Hebert contends that, as an employee of Mid South, he performed offshore construction and that, as one of its stockholders, he served on the corporate board of directors. According to his petition, Hebert claims to have sustained personal injuries as a result of an accident, which occurred on March 25, 1992, within the course and scope of his employment with Mid South. He claims that the accident occurred on a platform rig in the South Timbalier Block 172 area off the coast of Louisiana.

The petition further alleges that Mid South discouraged Hebert from filing a claim for compensation benefits because of the corporation's reluctance to have a workers' compensation claim filed against it. Hebert alleges that, to keep him from filing a claim, Mid South offered to continue his monthly salary of $3,100.00 and pay all of his medical expenses and assured him of his continued participation in the company's year-end bonus program. Based on these assurances, Hebert contends that he did not initially file a compensation claim. However, in his petition, Hebert claims that in November of 1992 he became concerned because of his inability to return to work and because of Mid South's change of attitude concerning his inability to work. In order to protect himself, Hebert decided to file a claim pursuant to 33 U.S.C. S 901 et. seq, the Longshore and Harbor Workers' Compensation Act (LHWCA). The record before us does not reflect the date this action was filed but does contain settlement documents, which confirm that it was filed.

Hebert's original petition alleges that Mid South contested his LHWCA claim in every possible way. In December of 1992, Hebert's physicians released him to return to work with certain restrictions. At that time, Mid South

informed Hebert that *3 there was no position in the company for him. According to Hebert's petition, Mid South's refusal to allow him to return to work was a result of his decision to pursue the LHWCA claim.

The petition additionally contains allegations that after Hebert filed his LHWCA claim, the method of shareholder profit distribution was changed to his detriment; he was removed from the board of directors; his disability benefits were only one-half of what they should have been because Mid South failed to properly place disability insurance on him; and Mid South attempted to take advantage of his destitute situation and purchase his Mid South stock at a rate far below its actual value. He contends that all of these actions by Mid South were in response to his LHWCA claim.

On June 11, 1993, Mid South responded to the petition by filing declinatory exceptions of improper venue and lack of subject matter jurisdiction, dilatory exceptions of vagueness and prematurity, and a peremptory exception of no cause of action. On June 26, 1993, a hearing [FN1] was held on these exceptions, and after completion of the hearing, the trial court took them under advisement. On September 2, 1993, the trial court issued a written ruling, granting the exception of vagueness and ordering Hebert to amend his petition to "allege whether or not the injury was sustained on the Outer Continental Shelf." The ruling on the exception of lack of subject matter jurisdiction was continued pending Hebert's amendment. The remaining exceptions were overruled. On September 30, 1993, Hebert amended his original petition to allege that the accident occurred on the Outer Continental Shelf.

FN1. The record does not contain a transcript of the hearing or even a minute entry associated therewith. All that is available concerning the hearing is the trial court's later ruling.

No new filings occurred in this litigation for almost two years. However, during that time, Hebert's LHWCA claim was being pursued in the appropriate compensation district of the United States Department of Labor, Office of Workers' Compensation. *4 On December 5, 1994, a joint application for approval of a settlement agreement was filed in that litigation, and on December 19, 1994, it was approved by an administrative law judge of the Office of Workers' Compensation. Under the terms of the agreement, Mid South paid Hebert $75,900.00 in settlement and reimbursement of expenses, and all claims pending before that forum were dismissed.

On August 9, 1995, the state litigation once again arose when Mid South filed new declinatory exceptions of lack of subject matter jurisdiction and improper venue and a peremptory exception of res judicata. At the hearing [FN2] on December 4, 1995, the issues decided by the trial court consisted of a claim of discrimination in employment because Hebert was not rehired [FN3] and claims for breach of an employment contract. At the conclusion of the hearing, the trial court rendered judgment in favor of Mid South. While the trial court's oral reasons for judgment are not clear as to the specifics under which it granted the exceptions, the judgment itself specifies that the trial court granted all three exceptions. The declinatory exception of lack of subject matter jurisdiction and the peremptory exception of res judicata were granted as to Hebert's claim for discrimination, and the declinatory exception of improper venue was granted as to his claims for breach of the employment contract. The effect of these decisions was to terminate the litigation in the Fifteenth Judicial District, and Hebert has appealed.

FN2. Judge Bertrand presided over the hearing on the first set of exceptions whereas Judge Hugh E. Brunson presided over the hearing on the second set of exceptions.

FN3. Mid South refers to this part of the litigation as a claim for retaliatory discharge. Hebert attempts to draw a distinction between a retaliatory discharge action and one for failure to rehire. Under either state or federal law, the claim is simply one for discrimination.

OPINION

Hebert asserts three assignments of error in his appeal. He contends that:

1. The trial court committed manifest error when it concluded that Hebert's cause of action for discrimination, based on Mid South's failure to reemploy him, was barred by res judicata; *5
2. The trial court committed manifest error when it concluded that it lacked subject matter jurisdiction over Hebert's employment discrimination claim; and
3. The trial court committed manifest error when it concluded that Lafayette Parish was a parish of improper venue for Hebert's claims of breach of employment contract.

If we do not have subject matter jurisdiction over this action, then we will be unable to reach the issue of res judicata. Therefore, we will first address the issue of lack of subject matter jurisdiction.

Subject Matter Jurisdiction

Mid South contends that the state court does not have subject matter jurisdiction to hear an employment discrimination claim when the discrimination is alleged to have resulted from the filing of a claim under the LHWCA. Relying on *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir.1985), Mid South argues that because the accident occurred on the Outer Continental Shelf, jurisdiction lies exclusively under the LHWCA, particularly 33 U.S.C. S 948a. In *LeSassier*, the plaintiff was injured on a fixed platform located on the Outer Continental Shelf off the Louisiana coast. He filed a successful claim for benefits under the

LHWCA and was then discharged by his employer. The plaintiff then brought a diversity suit for retaliatory discharge pursuant to La. R.S. 23:1361(B). In affirming a summary judgment in favor of LeSassier's employer, the Fifth Circuit Court of Appeal held that "there is no authority permitting [LeSassier] to invoke the state retaliatory discharge remedy over its LHWCA counterpart." *LeSassier*, 776 F.2d 506, 509.

The decision in *LeSassier* was based on the fact that the accident occurred on the Outer Continental Shelf, not on the idea that the LHWCA preempted the use of state law in all cases. In *Wallace v. Ryan-Walsh Stevedoring Co.*, 708 F.Supp. 144 (E.D.Tx.1989), the plaintiff was employed as a gearman at the Port of Beaumont in Beaumont, Texas. He was injured in an automobile accident during the course of his *6 duties and filed both a LHWCA claim and a claim under Texas workers' compensation law. He ultimately filed an action for retaliatory discharge under Texas law, and his employer contended that the LHWCA, particularly 33 U.S.C. S 948a, preempted the state law claim. The Federal District Court explained the jurisdictional conflicts as follows:

> Currently, maritime injuries fall within three jurisdictional spheres. At the seaward extreme, the LHWCA is the exclusive remedy. For injuries occurring on land outside the jurisdictional grasp of the LHWCA, state law alone governs. In the twilight zone, however, "maritime but local" injuries may be compensated by federal or state law.

Id. at 153 (citations omitted).

Thus, it held that the plaintiff, whose action fell within the twilight zone of jurisdiction, could choose to seek relief under either Texas law or under the LHWCA. However, in doing so, the court concluded that the Outer Continental Shelf Lands Act, 43 U.S.C. S 1333(b), adopted the LHWCA as "the exclusive means for compensating injuries occurring

as the result of operations conducted on the outer Continental Shelf." Id. (citation omitted).

However, the Louisiana Supreme Court reached a different conclusion in *Thompson v. Teledyne Movible Offshore, Inc.*, 419 So.2d 822 (La.1982), *appeal dismissed for want of a substantial federal question*, 464 U.S. 802, 104 S.Ct. 48, 78 L.Ed.2d 69 (1983). Thompson was injured on a stationary platform located on the Outer Continental Shelf off the coast of Louisiana. He brought suit in state court under state law for workers' compensation benefits. Thompson's employer filed an exception of lack of subject matter jurisdiction, which was rejected by the district court and maintained by this circuit on writs. In reversing the court of appeal, the supreme court stated that:

> [W]e find that the Louisiana state courts do have subject matter jurisdiction over a claim for Louisiana compensation benefits because of an employment related accidental injury sustained by a Louisiana worker *7 hired in Louisiana for work on a fixed platform outside the territorial waters of Louisiana.

Id. at 823.

In reaching this conclusion, the supreme court interpreted the holding in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), to mean "that the federal political jurisdiction to which the Outer Continental Shelf Lands Act (43 U.S.C. S 1331 et seq.) is directed did not preclude a state court's concurrent judicial jurisdiction over matters traditionally within their province." Id. at 825.

We recognize that the federal court decisions are in complete conflict with the decision of the Louisiana Supreme Court. In determining the appropriate result in this case, we feel compelled to follow the guidance of the highest court of this state. Therefore, we conclude that the state district court does have subject matter jurisdiction of a claim for

discrimination associated with retaliatory discharge or failure to rehire, and we reverse the trial court on that issue.

Res Judicata

Having concluded that the state court does have subject matter jurisdiction, we can now turn to the issue of whether Hebert's claim is barred by res judicata. La.R.S. 13:4231 provides as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

*8 Mid South argues that Hebert had an opportunity to bring his retaliatory discharge or failure to rehire claim pursuant to 33 U.S.C. S 948a as part of the LHWCA proceedings, but he failed to do so, and therefore, the judgment approving the compensation settlement in those proceedings extinguished this cause of action.

The LHWCA judgment approving the compromise contained the following language:

> The Agreed Settlement provides for the release and discharge of the Respondent Employer, Mid South Controls and Services, Inc., and Respondent Commercial Union Insurance Company, Carrier, of liability for the payment to the Employee Claimant of any additional sums for past and future compensation and medical expenses, related in any way to the injury allegedly sustained by Employee on March 25, 1992, upon the payment to Employee of the lump sum settlement and reimbursement as specified, subject to payment by the Claimant, out of the lump sum settlement amount, of the specified attorney's fee. (Emphasis added).

The LHWCA provision relative to discrimination against employees for bringing a claim for benefits imposes a civil penalty to the guilty employer of $1,000.00 to $5,000.00. 33 U.S.C. S 948a. However, the penalty is paid to a special fund administered under the LHWCA, rather than to the employee. The employee's relief consists of reinstatement to his job and compensation for lost wages. Id. The corresponding Louisiana statute allows the employee to recover the civil penalty, which is defined as the equivalent of his loss of income, not to exceed one year's earnings; reasonable attorney fees; and court costs. La.R.S. 23:1361.

It is significant to note that in this litigation, the state action was filed before completion of the LHWCA action and was still pending at the time the LHWCA settlement was reached. Mid South did nothing to attempt to consolidate these actions, and we do not find that the concept of res judicata was intended to apply to pending litigation. Therefore, we find that the trial court erred in granting the exception of res judicata.

*9 Exception of Improper Venue

The trial court found that the proper venue for the employment contract claims was the Twenty-Fourth Judicial District Court in Jefferson Parish and ordered those claims

transferred to that judicial district. In reversing this ruling, we need not reach the merits of the decision.

In relation to the time in which a declinatory exception of improper venue must be filed, La.Code Civ.P. art. 928(A) provides as follows:

> The declinatory exception and the dilatory exception shall be pleaded prior to answer or judgment by default. When both exceptions are pleaded, they shall be filed at the same time, and may be incorporated in the same pleading. When filed at the same time or in the same pleading, these exceptions need not be pleaded in the alternative or in a particular order.

In this case, Mid South originally complied with this requirement by simultaneously filing declinatory exceptions of improper venue and lack of subject matter jurisdiction, dilatory exceptions of prematurity and vagueness, and a peremptory exception of no cause of action. However, all of these exceptions, other than the exception of lack of subject matter jurisdiction, were ruled upon by the trial court on September 2, 1993. The original exception of improper venue was overruled. A judgment overruling a declinatory exception of improper venue is an interlocutory judgment that is appealable because it may cause irreparable harm. La.Code Civ.P. art. 2083(A); *A & P Boat Rentals, Inc. v. American Lloyd's*, 592 So.2d 1361 (La.App. 1 Cir.1991). The supervisory writ procedure is also available to obtain an expedited review of the issue. *Chambers v. LeBlanc*, 598 So.2d 337 (La.1992). No appeal or application for supervisory writs was requested by Mid South as to the September 2, 1993 ruling.

The exception before us at this time is a second exception of improper venue, which cannot be considered as timely pursuant to La.Code Civ.P. art. 928(A). By not pursuing a review of the trial court's first ruling, Mid South waived any objection to *10 the venue.

DISPOSITION

For the foregoing reasons, we reverse the trial court's judgment granting Mid South's exceptions of lack of subject matter jurisdiction, improper venue, and res judicata. The matter is remanded for further proceedings. All costs of this appeal are taxed against Mid South Controls and Services, Inc.

REVERSED AND REMANDED.

APPENDIX C

FIFTEENTH JUDICIAL DISTRICT COURT
PARISH OF LAFAYETTE
STATE OF LOUISIANA

NO. 93-1649-2B

EARL J. HEBERT JR.

VERSUS

MID SOUTH CONTROLS AND SERVICES, INC.

JUDGMENT

The captioned matter came to be heard pursuant to defendant's Exceptions of Improper Venue, Res Judicata and Lack of Subject Matter Jurisdiction on December 4, 1995, with the parties and their counsel present in court. The court reviewed the briefs of counsel and heard oral argument in connection with the exceptions filed herein. For reasons assigned in open court, which reasons are made a part hereof;

IT IS ORDERED, ADJUDGED AND DECREED that defendant's Exceptions of Lack of Subject Matter Jurisdiction and Res Judicata, be and the same are hereby sustained and plaintiff's claims in that regard are hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant's Exception of Venue is hereby sustained and all actions remaining herein are hereby ordered transferred to Jefferson Parish, Louisiana, 24th Judicial District Court.

Costs in connection with this matter are to be paid by plaintiff, Earl J. Hebert, Jr.

JUDGMENT RENDERED December 4, 1995, NOW READ AND SIGNED in Crowley, Louisiana, this 20th day of December, 1995.

/s Hugh E. Brunson

Hugh E. Brunson, District Judge

APPENDIX D

FIFTEENTH JUDICIAL DISTRICT COURT
PARISH OF LAFAYETTE
STATE OF LOUISIANA

NO. 93-1649-2B

EARL J. HEBERT JR.

VERSUS

MID SOUTH CONTROLS AND SERVICES, INC.

RULING

This matter came before the Court on July 26, 1993, on Exceptions of No Subject Matter Jurisdiction, Vagueness, Prematurity, Improper Venue and No Cause of Action filed by Defendant, Mid South Controls & Services, Inc. After the filing of supplemental briefs, the case was taken under advisement by the Court.

Petitioner previously filed a claim for benefits under the Longshore and Harbor Worker's Compensation Act. In accordance with the holding in LeSassier v Chevron, USA Inc., 776 F.2d 506 (5th Cir. 1985), the Court finds that for accidents or injuries occurring on platforms on the Outer Continental Shelf, the applicable compensation scheme is the LHWCA. The exclusive jurisdiction for claims for retaliatory discharge is also under the provisions of LHWCA.

In petitioner's suit for damages he alleges, "On or about March 25, 1992, while in the course and scope of his employment with defendant corporation, plaintiff suffered an injury on a fixed platform in the South Timbalier Block 172 area, in the offshore waters off the coast of the State of Louisiana." The allegations of the petition do not inform the

Court of the location of the fixed platform; i.e., whether it is or is not located on the Outer Continental Shelf. For this reason, the Court sustaines Defendant's Exception of Vagueness and further orders petitioner to amend his petition to allege whether or not the injury was sustained on the Outer Continental Shelf.

The Exception of No Subject Matter Jurisdiction will be continued until the Plaintiff cures the vagueness.

The remainder of the Exceptions filed by Defendant herein are overruled.

Lafayette, Louisiana, this 2nd day of September, 1993.

/s Lucien C. Bertrand

Lucien C. Bertrand, Judge Ad Hoc

APPENDIX E

STATUTORY MATERIALS

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, provides:

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that

portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting [FN1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section--

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

The Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 905(a), provides:

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

The Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 948(a), provides:

§ 948a. Discrimination against employees who bring proceedings; penalties; deposit of payments in special fund; civil actions; entitlement to restoration of employment and compensation, qualifications requirement; liability of employer for penalties and payments; insurance policy exemption from liability

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. The discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Any employer who violates this section shall be liable to a penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 944 of this title, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation. The employer alone and not his carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void.

The Louisiana Worker's Compensation Act, La. R.S. 23:1361, provides:

§ 1361. Unlawful discrimination prohibited

A. No person, firm or corporation shall refuse to employ any applicant for employment because of such applicant having asserted a claim for worker's compensation benefits under the provisions of this Chapter or under the law of any state or of the United States. Nothing in this Section shall require a person to employ an applicant who does not meet the qualifications of the position sought.

B. No person shall discharge an employee from employment because of said employee having asserted a claim for benefits under the provisions of this Chapter or under the law of any state or of the United States. Nothing in this Chapter shall prohibit an employer from discharging an employee who because of injury can no longer perform the duties of his employment.

C. Any person who has been denied employment or discharged from employment in violation of the provisions of this Section shall be entitled to recover from the employer or prospective employer who has violated the provisions of this Section a civil penalty which shall be the equivalent of the amount the employee would have earned but for the discrimination based upon the starting salary of the position sought or the earnings of the employee at the time of the discharge, as the case may be, but not more than one year's earnings, together with reasonable attorney's fees and court costs.

D. The rights and remedies granted by this Section shall not limit or in any way affect any rights and remedies that may

be available under the provisions of any other state or federal law.

E. Any party found by a hearing officer or a court of competent jurisdiction to have brought a frivolous claim under this Section shall be held responsible for reasonable damages incurred as a result of this claim, including reasonable attorney's fees and court costs.

Supreme Court, U.S.
FILED
JUN 30 1997
CLERK

DOCKET NO. 96-1897

In the
Supreme Court of the United States
October Term, 1996

MID-SOUTH CONTROLS & SERVICES, INC.,
Petitioner,

versus

EARL J. HEBERT, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Third Circuit, State of Louisiana

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, EARL J. HEBERT, JR.

Respectfully submitted:
PREIS, KRAFT & ROY
L. LANE ROY, Counsel of Record
TIMOTHY W. BASDEN
102 Versailles Blvd. Suite 400
P.O. Drawer 94-C
Lafayette, LA 70509
(318) 237-6062

16 pp

DOCKET NO. 96-1897

In the
Supreme Court of the United States
October Term, 1996

MID-SOUTH CONTROLS & SERVICES, INC.,
Petitioner,

versus

EARL J. HEBERT, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Third Circuit, State of Louisiana

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, EARL J. HEBERT, JR.

Respectfully submitted:
PREIS, KRAFT & ROY
L. LANE ROY, Counsel of Record
TIMOTHY W. BASDEN
102 Versailles Blvd. Suite 400
P.O. Drawer 94-C
Lafayette, LA 70509
(318) 237-6062

TABLE OF CONTENTS

TABLE OF AUTHORITIES AND SYLLABUS ii

OPPOSITION TO WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 2

A. Procedural History 2

REASONS WHY THE WRIT SHOULD NOT BE GRANTED . . . 5

I. EARL HEBERT, JR.'S STATE LAW TORT CLAIM FOR RETALIATORY WORK PLACE DISCRIMINATION IS NOT PREEMPTED BY THE LONGSHORE HARBOR WORKERS' COMPENSATION ACT 6

A. Earl Hebert, Jr.'s State Law Claim For Retaliatory Work Place Discrimination is Not a Workers' Compensation Claim and Does Not Seek Workers' Compensation Benefits 6

II. MID SOUTH CONTROLS DID NOT ARGUE BELOW THAT THE FEDERAL LAW OF RES JUDICATA APPLIED TO THIS CASE AND MAY NOT RAISE THIS ISSUE IN THE FIRST INSTANCE IN THIS COURT 10

CONCLUSION 11

TABLE OF AUTHORITIES AND SYLLABUS

Cardinale v. Louisiana,
394 U.S. 437, 22 L.Ed.2d
398, 400, 89 S.Ct. 1162 (1969) 6, 10

Clark v. Jeter,
486 U.S. 456, 100 L.Ed.2d
465, 470-471, 100 S.Ct. 910 (1988) 5, 10

LaSassier v. Chevron,
776 F.2d 506 (5th Cir. 1985) 8, 9

R.A.V. v. City of St. Paul,
505 U.S. 377, 120 L.Ed.2d 305,
112 S.Ct. 2538 (1992) 9

Sampson v. Wendy's Management, Inc.,
593 So.2d 336, 338 (La. 1992) 5, 7, 8, 9

Thompson v. Teledyne Movable Offshore, Inc.,
419 So.2d 822 (La. 1982) 8

Wisconsin v. Todd Mitchell,
508 U.S. 476, 124 L.Ed.2d 436,
113 S.Ct. 2194 (1993) 9

FEDERAL STATUTES:

Longshore Harbor Workers' Compensation Act,
33 U.S.C. § 905 (a) 2, 3, 5, 7, 8, 9

LOUISIANA STATUTES:

La. R.S. 23:1361 . . . . . 2, 3, 5, 6, 7, 8, 9

La. R.S. 23:1035.2 . . . . . 5, 8

NO. 96-1897

In the Supreme Court
of the
United States

MID-SOUTH CONTROLS & SERVICES, INC.,
Petitioner,

versus

EARL J. HEBERT, JR.,
Respondent.

OPPOSITION TO WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Respondent, Earl J. Hebert, Jr., respectfully asserts that the decision of the Louisiana Third Circuit Court of Appeal in the present case need not be reviewed by this court because this case does not present a significant issue of federal law and does not present a significant conflict between federal law and the laws of the State of Louisiana.

STATEMENT OF THE CASE

This case involves a lawsuit filed in Louisiana State District Court by Earl J. Hebert, Jr. against Mid South Controls & Services, Inc. arising out of Hebert's employment and business relationship with Mid South. Hebert alleged in his suit for damages that he was both an employee and a shareholder of Mid South Controls and that, following a work related injury for which Hebert collected workers' compensation benefits under the Longshore Harbor Workers' Compensation Act (LHWCA), Mid South Controls unlawfully discriminated against Hebert by either firing or refusing to rehire him after his medical treatment. Hebert sued Mid South Controls in Louisiana State District Court for retaliatory work place discrimination under La. R.S. 23:1361(a). Additionally, Hebert's suit alleged that Mid South Controls breached its contracts with Hebert by failing to pay Hebert a proper share of the profits of the corporation, by trying to force Hebert out of the corporation, by failing to purchase and maintain proper disability insurance for Hebert, and by other breaches of contractual duty.

This case has not yet been tried and no evidentiary hearings have been held by the trial court; all statements of fact made by Mid South Controls and Hebert are merely assertions. As correctly observed by the Louisiana Third Circuit Court of Appeal in its decision in this matter, since the facts of this case are still in dispute, the procedural history is of primary importance.

A. Procedural History

Following an injury which occurred during the course and scope of Hebert's employment with Mid South Controls while working on a fixed platform located on the outer continental shelf, Hebert filed a claim for workers' compensation benefits under the LHWCA. Shortly thereafter, and following a period of discriminatory conduct by Mid South Controls in retaliation for Hebert's having filed the workers' compensation claim,

Hebert filed the present suit alleging the Louisiana state tort of retaliatory work place discrimination under La. R.S. 23:1361 and breach of contract claims arising out of Hebert's relationship with Mid South Controls.

On June 11, 1993, approximately two (2) months after Hebert filed the present action in Louisiana state court, Mid South Controls filed Declinatory Exceptions of Lack of Subject Matter Jurisdiction and Improper Venue, Dilatory Exceptions of Vagueness and Prematurity, and a Peremptory Exception of No Cause of Action. A hearing was held on these exceptions on June 26, 1993 before Judge Lucien Bertrand. After taking the matter under advisement, Judge Bertrand issued a written ruling granting the Dilatory Exception of Vagueness and ordering Hebert to amend his petition to clarify whether the injury was sustained on the outer continental shelf. The ruling on the Declinatory Exception of Lack of Subject Matter Jurisdiction was continued pending Hebert's amendment. The remaining Exceptions of Prematurity, Improper Venue and No Cause of Action were overruled. On September 30, 1993, Hebert amended the original petition to clarify that the accident which was the subject of the workers' compensation proceeding occurred on the outer continental shelf. Neither Hebert nor Mid South Controls appealed Judge Bertrand's rulings on any of the exceptions.

Hebert did not assert any Louisiana workers' compensation or tort claims in the Louisiana state courts or the Louisiana Office of Workers' Compensation arising out of the accident. Since Hebert's injury occurred during the course and scope of his employment while working on the outer continental shelf, the LHWCA was the exclusive remedy for claims arising from Hebert's work-related injury. Hebert's claims for medical payments and benefits arising out of his injury were pursued under the LHWCA in the proper forum with the United States Department of Labor. The LHWCA proceeding and the Louisiana state court tort action were litigated concurrently.

Hebert and Mid South Controls subsequently reached a settlement agreement in the LHWCA matter. On December 5, 1994, a joint application for approval of the settlement was filed in the LHWCA

workers' compensation action and on December 19, 1994 the settlement was approved by an administrative law judge of the United States Department of Labor, Office of Workers' Compensation. Under the terms of that agreement, Mid South Controls paid Hebert $75,900.00 in compensation benefits and expenses and secured from Hebert a release for all future claims for workers' compensation benefits arising out of the injury.

On August 9, 1995 Mid South Controls again asserted its Declinatory Exception of Lack of Subject Matter Jurisdiction in the Louisiana state court proceedings. With this exception, Mid South Controls also filed a Peremptory Exception of Res Judicata (under the Louisiana res judicata articles) and reasserted its previously rejected Declinatory Exception of Improper Venue. Mid South Controls' new exception of Louisiana res judicata was based on Mid South Controls' assertion that the settlement of Hebert's workers' compensation claims under the LHWCA precluded Hebert from further pursuing his Louisiana tort suit for retaliatory discrimination and breach of contract. The trial court considered and granted all three (3) exceptions, dismissing Hebert's state law retaliatory discrimination claim and ordering that Hebert refile his contract and other employment related claims in a different venue, Jefferson Parish, Louisiana. Hebert appealed this decision and the Louisiana Third Circuit Court of Appeal reversed the trial court on all three issues. Following the Third Circuit's reversal, Mid South Controls filed an Application for Writ of Certiorari to the Louisiana Supreme Court, which was refused.

Mid South Controls filed an Application for Writ of Certiorari to this court which Hebert hereby opposes.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The conflict between Louisiana Law, La. R.S. 23:1361, and the Longshore Harbor Workers' Compensation Act, 33 U.S.C. § 905 (a), as set forth in the petition for Writ for Certiorari filed by Mid South Controls, simply does not exist. The decision of the Louisiana Third Circuit Court of Appeal in this case does not authorize the receipt of workers' compensation benefits under Louisiana law in addition to workers' compensation benefits under the LHWCA. In fact, Louisiana law, La. R.S. 23:1035.2, prohibits the receipt of Louisiana workers' compensation benefits when the injured employee is eligible to receive workers' compensation benefits under the LHWCA. Additionally, the statute which creates the cause of action asserted by Hebert in the present case, La. R.S. 23:1361, has been interpreted by the Louisiana Supreme Court as constituting a delictual employment law matter, as a statutory exception to employment at will, rather than a workers' compensation matter. Sampson v. Wendy's Management, Inc., 593 So.2d 336, 338 (La. 1992). Accordingly, Hebert's assertion of his Louisiana employment law claim under La. R.S. 23:1361 is not affected by the receipt of workers' compensation benefits under federal law. Since the LHWCA is not intended to preempt the Louisiana regime of at will employment, this case does not present a federal preemption issue suitable for review by this court.

Mid South Controls' assertion in his application to this court that the Louisiana Third Circuit Court of Appeal erred by failing to apply the federal law of Res Judicata in this case is not properly before the court. Mid South Controls first raised the issue of whether the federal law of Res Judicata applies to this case in its petition for Writ of Certiorari to this court. Since this issue was not "pressed or past upon" below, certiorari should not issue to review Mid South Controls' claim that the federal law of Res Judicata should have been applied and, if applied, could have effected the outcome of the case below. Clark v. Jeter, 486

U.S. 456, 100 L.Ed.2d 465, 470-471, 100 S.Ct. 910 (1988); Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 400, 89 S.Ct. 1162 (1969).

I. EARL HEBERT, JR.'S STATE LAW TORT CLAIM FOR RETALIATORY WORK PLACE DISCRIMINATION IS NOT PREEMPTED BY THE LONGSHORE HARBOR WORKERS' COMPENSATION ACT

A. Earl Hebert, Jr.'s State Law Claim For Retaliatory Work Place Discrimination is Not a Workers' Compensation Claim and Does Not Seek Workers' Compensation Benefits

Earl Hebert's claim against Mid South Controls for work place retaliatory discrimination arises under La. R.S. 23:1361, which provides:

> A. No person, firm or corporation shall refuse to employ any applicant for employment because of such applicant having asserted a claim for workers' compensation benefits under the provisions of this chapter or under the law of any state or of the United States. Nothing in this section shall require a person to employ an applicant who does not meet the qualifications of the position sought.
>
> B. No person shall discharge an employee from employment because of said employee having asserted a claim for benefits under the provisions of this chapter or under the law of any state or of the United States. Nothing in this chapter shall prohibit an employer from discharging an employee who because of injury can no longer perform the duties of his employment.
>
> C. Any person who has been denied employment or discharged from employment in violation of the provisions of this section shall be entitled to recover from the employer or prospective employer who has violated the provisions of this

section a civil penalty which shall be the equivalent of the amount the employee would have earned but for the discrimination based upon the starting salary of the position sought or the earnings of the employee at the time of the discharge, as the case may be, but not more than one years earnings, together with reasonable attorney's fees and court costs.

D. The rights and remedies granted by this section shall not limit or in any way affect any rights and remedies that may be available under the provisions of any other state or federal law.

E. Any party found by a Hearing Officer or a court of competent jurisdiction to have brought a frivolous claim under this section shall be responsible for reasonable damages incurred as a result of this claim, including reasonable attorney's fees and court costs.

La. R.S. 23:1361 (emphasis added).

Specifically, Hebert claims that Mid South Controls either fired or refused to rehire him following his release by his treating physicians to return to work and that the discrimination was based solely upon Hebert's having filed a claim for workers' compensation benefits under the LHWCA. Clearly, § 1361 creates a state tort cause of action in favor of Hebert and against Mid South Controls for this kind of retaliatory discrimination.

The Louisiana Supreme Court in Sampson v. Wendy's Management, Inc., 593 So.2d 336 (La. 1992) held that claims under § 1361 are not workers' compensation claims but are, in fact, state law tort claims arising out of the employment contract. The Louisiana Supreme Court held in Sampson that La. R.S. 23:1361 "constitutes a delictual employment law matter, [...] a statutory exception to employment at will, rather than a workers' compensation matter." Sampson v. Wendy's, 593 So.2d at 338. Furthermore, the Louisiana Supreme Court held that the fact that § 1361 is located in the chapter of the Louisiana

Revised Statutes which also contains the state workers' compensation law is irrelevant in determining the nature of the cause of action. A suit under § 1361 simply does not constitute a workers' compensation matter, Sampson v. Wendy's, 593 So.2d at 338-339, and is not preempted by federal workers' compensation laws.

Mid South Controls' argument that La. R.S. 23:1361 is preempted by federal workers' compensation laws fails to consider that, under Louisiana law, a worker is prohibited from receiving Louisiana workers' compensation benefits if that worker is eligible for the receipt of workers' compensation benefits under the Longshore Harbor Workers' Compensation Act. La. R.S. 23:1035.2 establishes this prohibition:

> No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employers' Liability Act, the Longshoreman's and Harbor Workers' Compensation Act, or any of its extensions, or the Jones Act.

La. R.S. 23:1035.2. Under this statute and the preceding jurisprudence it is clear that Hebert is not receiving both federal and state workers' compensation benefits and no preemption issue exists.

Mid South Controls relies upon LaSassier v. Chevron, 776 F.2d 506 (5th Cir. 1985), for its argument that § 1361 is a workers' compensation matter which may not be filed separately from claims under the LHWCA. In LaSassier, the United States Fifth Circuit criticized the Louisiana Supreme Court's decision in Thompson v. Teledyne Movable Offshore, Inc., 419 So.2d 822 (La. 1982), *appeal dismissed for want of a substantial federal question,* 464 U.S. 802, 104 S.Ct. 48 (1983) which held that workers could choose to receive benefits under either the LHWCA or Louisiana workers' compensation laws because Louisiana state courts had concurrent jurisdiction to adjudicate claims arising on the outer continental shelf. However, the holding of Thompson v. Teledyne which granted Louisiana workers the right to choose whether to pursue state or federal workers' compensation remedies was legislatively overruled by La. R.S. 23:1035.2 (quoted above) which prohibited

workers from seeking state workers' compensation benefits in the event that federal benefits were available.

The conflict between federal and state remedies described in LaSassier v. Chevron has been resolved by the Louisiana Supreme Court. The United States Fifth Circuit Court of Appeal held in LaSassier v. Chevron, *supra*, that claims for retaliatory work place discrimination under La. R.S. 23:1361 are workers' compensation matters which may be preempted if the claimant is an injured worker who has received workers' compensation benefits under the LHWCA. The holding of the Fifth Circuit was based upon the Fifth Circuit's characterization of claims under § 1361 as workers' compensation matters. The Louisiana Supreme Court in Sampson v. Wendy's, *supra*, which was decided seven (7) years after LaSassier v. Chevron, held that claims for retaliatory work place discrimination under La. R.S. 23:1361 were not workers' compensation claims but were claims for wrongful discharge under Louisiana employment law.

When faced with conflicting interpretations of state law, it is well settled that the interpretation of a state statute by the state's highest court is authoritative and binding on this court. R.A.V. v. City of St. Paul, 505 U.S. 377, 120 L.Ed.2d 305, 112 S.Ct. 2538 (1992); Wisconsin v. Todd Mitchell, 508 U.S. 476, 124 L.Ed.2d 436, 113 S.Ct. 2194 (1993). Accordingly, Mid South Control's argument that this court should adopt the interpretation of La. R.S. 23:1361 as set forth in the United States Fifth Circuit Court of Appeal decision in LaSassier v. Chevron and overrule the Louisiana Supreme Court's interpretation of La. R.S. 23:1361 contained in Sampson v. Wendy's Management, Inc., does not present a viable issue for this court's review.

II. MID SOUTH CONTROLS DID NOT ARGUE BELOW THAT THE FEDERAL LAW OF RES JUDICATA APPLIED TO THIS CASE AND MAY NOT RAISE THIS ISSUE IN THE FIRST INSTANCE IN THIS COURT

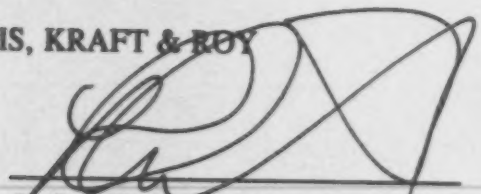
Mid South Controls' assertion in its application to this court that the Louisiana Third Circuit Court of Appeal erred by failing to apply the federal law of Res Judicata in this case is not properly before the court. Mid South Controls first raised the issue of whether the federal law of Res Judicata applies to this case in his petition for Writ of Certiorari to this court. Since this issue was not "pressed or past upon" below, certiorari should not issue to review Mid South Controls' claim that the federal law of Res Judicata should have been applied and, if applied, could have effected the outcome of the case below. Clark v. Jeter, 486 U.S. 456, 100 L.Ed.2d 465, 470-471, 100 S.Ct. 910 (1988); Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 400, 89 S.Ct. 1162 (1969).

CONCLUSION

Earl J. Hebert, Jr. respectfully asserts that the present case presents no significant federal issues for review. The application for Writ of Certiorari filed by Mid South Controls, Inc. should be denied.

Respectfully submitted,

PREIS, KRAFT & ROY

BY: 

L. LANE ROY, Counsel of Record
TIMOTHY W. BASDEN
102 Versailles Blvd., Suite 400
P. O. Drawer 94-C
Lafayette, LA 70509
(318) 237-6062

Supreme Court, U.S.
FILED
AUG 28 1997
CLERK

(3)

No. 96-1897

In the Supreme Court of the United States

October Term, 1996

MID-SOUTH CONTROLS & SERVICES, INC.,
Petitioner,

v.

EARL J. HEBERT, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court and the Court of Appeal, Third Circuit, State of Louisiana

PETITIONER'S REPLY

OF COUNSEL:
LEE A. ARCHER
4909 West St. Charles Ave.
Lake Charles, LA 70605
Telephone: (318) 480-1155

FRANK M. BUCK, JR.
Energy Centre, Suite 2600
1100 Poydras Street
New Orleans, LA 70163
Telephone: (504) 585-7777

TIMOTHY J. FALCON*
5044 Lapalco Blvd.
Marrero, LA 70072
Telephone: (504) 341-1234

* Counsel of Record

7PP

No. 96-1897
In the Supreme Court
of the
United States

Mid-South Controls and Services, Inc.
v.
Earl J. Hebert, Jr.

PETITIONER'S REPLY

Petitioner, Mid South Controls and Services, Inc., respectfully submits its Reply in response to the Opposition filed by Respondent, Earl J. Hebert, Jr.

Respondent argues that this Court should not grant a writ in this case for two main reasons. Respondent first claims that there is no conflict between federal and state worker's compensation law because the Louisiana Supreme Court in *Sampson v Wendy's Management, Inc.*, 593 So.2d 336 (La. 1992), allegedly construed La. R.S. 23:1361, the retaliatory discharge section of the Louisiana's Worker Compensation law, as "a delictual employment law matter... rather than a worker's compensation matter." Opposition at p. 5. As such, respondent argues, he should be able to entertain his state law worker's compensation retaliatory discharge claims in state court, despite prior settlement of all of his LHWCA claims. This circuitous argument fails, for several reasons, discussed *infra.*

First of all, there is a serious question, after recent amendments to La. R.S. 23:1310.3, on which the *Sampson* Court relied, whether *Sampson* is still good law. Second, the Court in *Sampson* was not dealing with a federal preemption issue, the question was whether the state Office of Worker's

Compensation had exclusive jurisdiction over retaliatory discharge claims brought under the Louisiana Worker's Compensation Act. In this case, the issue is whether the Federal Act, the LHWCA, which also contains a retaliatory discharge provision, preempts Louisiana retaliatory discharge claims. The Federal Courts hold that the LHWCA, through OCSLA, does in fact preempt the Louisiana retaliatory discharge provision where OCS workers are concerned, and that exclusive jurisdiction to hear such claims is vested in the federal tribunals. See, *LeSassier v Chevron*, 776 F.2d 506 (5th Cir. 1985).

Furthermore, as evidenced by later Fifth Circuit cases, federal preemption may apply whether or not the state statute at issue involves a state worker's compensation claim: The preemption applies to all liability arising from the employment relationship. Such liability arising from the employment relationship includes not only wrongful discharge claims, as set forth in *LeSassier*, but other claims, including tort claims arising from the employment relationship. See. e.g., *Hetzel v Bethlehem Steel Corp.*, 1996 A.M.C. 1211, 32 Fed.R.Serv.3d 400 (5th Cir. 1995). Therein, an OCS worker who had filed for benefits under the LHWCA brought a separate diversity claim against his employer under the Texas Deceptive Trade Practices Act. The Fifth Circuit concluded that the tort suit was preempted, because the LHWCA provided the worker's sole remedy.

Accordingly, under federal decisions, whether or not Hebert's wrongful discharge claims are classified as a tort rather than a worker's compensation matter under the Louisiana Court's decision in *Sampson*, they still "arise as a result of the employment relationship" and are preempted by federal worker's compensation law, which provides an employee's "exclusive remedy" against his employer.

Hebert urges that this Court is bound by the Louisiana Supreme Court's decisions interpreting Louisiana laws. However, it is well settled that the issue whether the federal

LHWCA applies to preempt plaintiff's state law claim is a question of federal, and not state law. *Davidson v. Enstar Corp.*, 848 F.2d 574, *on rehearing* 860 F.2d 167, *rehearing denied* 864 F.2d 791 (5th Cir. 1988). State courts are bound by federal decisions on the subject. *Id.*, See also, *Byrd v. New York Central System*, 70 A.2d 97, 6 N.J.Super. 568 (N.J.Co.1949) *Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp.*, 65 A.2d 304, 193 Md. 20 (Md.1949).

To the extent that the state court's decisions in the instant case and in *Sampson, supra,* permit an independent state court action for retaliatory discharge after settlement of all of an OCS worker's LHWCA claims, those decisions are in direct conflict with federal law and with federal decisions interpreting the LHWCA, presenting an issue of extreme import which this Court should resolve.

Second, respondent urges that this court cannot issue a writ to consider whether the state court erred in failing to apply the federal law of res judicata in this case, because petitioner allegedly raised this issue for the first time before this Court. This argument is baseless. Petitioner raised the issue of res judicata by exception, and the issue was in fact ruled upon by the trial court and the court of appeal. Furthermore, petitioner quotes verbatim from its application to the Louisiana Supreme Court:

> In this case, the courts were asked to determine the preclusive effect of a judicially approved settlement rendered by a federal tribunal exercising federal question jurisdiction. When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, the federal law of res judicata must be applied. *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993) *cert. denied* --- U.S. ----, 114 S.Ct. 1191, 127 L.Ed.2d 541 (1994), citing *Commercial Box & Lumber Co. v. Uniroyal, Inc.*, 623 F.2d 371, 373 (5th Cir.1980).... See

also *James Tye v. Co-Mar Offshore Operators, Inc.*, 95 0094 (La.App. 1 Cir. 10/6/95), 1995 WL 588277 (when a state court considers the preclusive effect of a federal court judgment based on federal question jurisdiction, the court must apply the federal law of res judicata). (Application at p. 15.)

As such, respondent's contention that petitioner did not argue for application of the federal law of res judicata in the courts below is groundless.

CONCLUSION

The decision of the Louisiana state court permitting an outer Continental Shelf worker who has recovered from his employer under the Longshore and Harbor Worker's Compensation Act to maintain a state law compensation action for retaliatory discharge is directly contrary to federal law, including the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333; the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), federal Fifth Circuit jurisprudence directly on point, including *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir.1985) and *Hetzel v Bethlehem Steel Corp.*, 50 F.3d 360, 1996 A.M.C. 1211, 32 Fed.R.Serv.3d 400 (5th Cir. 1995), and congressional policy underlying the LHWCA.

Moreover, the decision of the Louisiana state court refusing to hold that the ALJ approved settlement of the LHWCA claims barred additional worker's compensation claims under the doctrine of *res judicata* is directly contrary to the federal law of *res judicata*, which must be applied in a case where the effect of a prior federal judgment is at issue.

As this Court noted in *Braxton v. U.S.*, 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991), a principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the circuit courts of appeals and state courts concerning the meaning of provisions of federal law. This case demonstrates that the state courts in Louisiana and the federal Fifth Circuit are in direct conflict over the

exclusivity provisions and the preemptive effect of the LHWCA in outer Continental Shelf cases, to the grave detriment of all Louisiana employers who provide benefits to their employees under the LHWCA.

Accordingly, petitioner Mid South Controls and Services, Inc., respectfully submits that a writ should issue to review the decision of the Louisiana Third Circuit Court of Appeal, and that, after due proceedings had, the decision should be reversed.

Respectfully submitted,

OF COUNSEL:
LEE A. ARCHER
4909 West St. Charles Ave.
Lake Charles, LA 70605
Telephone: (318) 480-1155

FRANK M. BUCK, JR.
Energy Centre, Suite 2600
1100 Poydras Street
New Orleans, LA 70163
Telephone: (504) 585-7777

TIMOTHY J. FALCON*
5044 LaPalco Blvd.
Marrerro, LA 70072
Telephone: (504) 341-1234

* Counsel of Record

August 28, 1997

Other counsel- service information:

L. Lane Roy, Esq.
102 Versailles Blvd., Suite 409
P.O. Drawer 94-C
Lafayette, LA 70509